United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7045

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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P/S

APPEAL NO. 75-7045

ARROW NOVELTY COMPANY, INC.,

Plaintiff-Appellee,

v.

ENCO NATIONAL CORPORATION,

Defendant-Appellant.

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

I hereby state under Penalty of Perjury that a True Copy of the foregoing is today mailed to Counsel for the opposing parties.

Date: 3/21/75

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REPLY BRIEF FOR APPELLANT

INTRODUCTION

The purpose of this brief is to rebut certain statements made by Arrow in its brief.

POINT 1: The statement on page 11 of Arrow's brief that its tray has been on sale for thirteen years giving Enco access which is direct evidence of copying is baseless.

The fact that Arrow's tray has been on the market for a number of years is not direct evidence of Enco's copying as Arrow alleges on page 11 of its brief. Arrow has failed to point out any direct evidence of Enco's copying which appears in the record and this statement by Arrow is merely a conclusion by their attorneys totally unsupported by the record.

POINT 2: The trial court erred in admitting plaintiff's New York City tray into evidence.

Arrow's New York City tray was admitted into evidence by the District Court because the dimensions thereof conformed to the dimensions set forth on the copyright certificate. Of course, this does not mean that the tray deposited in the Copyright Office is identical to PX-2.* The copyright certificate (PX-1) states that it is for a sculpture on a plastic composition whereas, Arrow, in its brief on page 2, states that its tray is pressed wood which obviously is not plastic.

Arrow's argument on page 15 that testimony showed PX-2 was the same tray as was deposited with the Copyright Office is incorrect. All of Arrow's witnesses upon being cross-examined admitted that they did not know what had been deposited with the Copyright Office. Specifically, Mr. Brown stated on cross-examination that he did not know what was deposited in the Copyright Office in order to obtain the copyright certificate (36a, 37a). Mr. Passella, Arrow's other witness, likewise testified (70a).

Mr. Brown's testimony that the tray had not changed and Mr. Passella's testimony that Arrow had not marketed another New York City tray is irrelevant since this does

*For reasons of its own, Arrow chose not to follow the simple process of obtaining and presenting at trial a certified photograph of the work which was deposited in the Copyright Office to obtain the copyright certificate sued upon.

not show what was deposited with the Copyright Office to obtain the copyright certificate.

Arrow's statement on page 16 of its brief that Mr. Litzenberger worked on the design of the tray and that the tray was the only possible tray that could have been registered is sheer speculation, particularly since Arrow chose not to obtain from the Copyright Office a certified photograph of what was deposited.

POINT 3: The trial court erred in admitting Mr. Slabodsky's hearsay statements.

Mr. Slabodsky's alleged statement to Mr. Brown in 1973 concerning Enco's intention to "knock off" the Arrow tray should have been excluded under the hearsay rule. There was no showing whatsoever that Mr. Slabodsky's employment carried with it a right to make admissions on behalf of Enco. Arrow had the chance to subpoena Mr. Slabodsky but declined preferring to rely on hearsay statements.

Arrow argues that even if Mr. Slabodsky's statements were not admissible, it did not prejudice Enco. There is no way of knowing this and it is interesting to note that in its statement of this case, Arrow relies heavily on the alleged statements of Mr. Slabodsky to sustain its position. This clearly shows that Arrow itself considers the hearsay important to its position.

CONCLUSION

It is respectfully submitted that the District Court's decision should be reversed and the complaint dismissed with costs and attorneys fees awarded to Enco.

Respectfully submitted,

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